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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

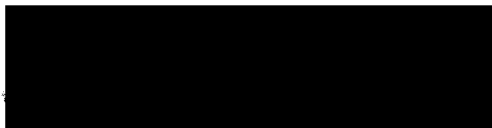
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ADMINISTRATIVE APPEALS OFFICE

425 Eye Street N.W.

BCIS, AAO, 20 Mass, 3/F

Washington, D.C. 20536



APR 25 2003

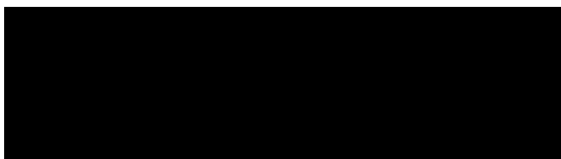
File: LIN-02-119-54523 Office: Nebraska Service Center Date:

IN RE: Petitioner:
Beneficiary:



Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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prevent clearly unwarranted
invasion of personal privacy**

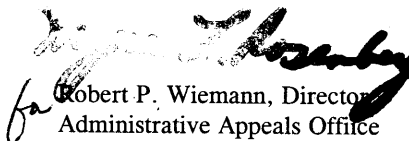
INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a provider of maritime services to cruise ships. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner had not established that the beneficiary had been or would be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel asserts that the beneficiary directs a necessary function of the petitioning entity and is therefore, eligible for the benefits sought. Counsel references several unpublished decisions as evidence of the beneficiary's eligibility.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization.

Regulations at 8 C.F.R. § 214.2(l)(14)(ii) state that a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The issue to be addressed in this proceeding is whether the beneficiary has been and will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

"Managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;

- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

"Executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;

ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The U.S. petitioner states that it was established in 1993 and that it is an affiliate of [REDACTED], located in Kamchatskiy, Russia. The petitioner declares two employees and a gross annual income of \$1.28 million. It seeks to extend the petition's validity and the beneficiary's stay for a period of two years at an annual salary of \$75,000.

The petitioner describes the beneficiary's duties, in pertinent part, as follows:

II. The position of President

To ensure [REDACTED] continued success, it would like [the beneficiary], the company's President, to continue working intermittently in the United States. The President is responsible for the following duties:

- . Overseeing and directing the company's entire U.S. operations, including its finances, administration, marketing, and sales to obtain optimal efficiency and maximize profit.

- . Establishing and implementing the company's goals and policies, as well as directing the company's long-term strategic development.

- . Negotiating contracts with U.S. cruise companies.

- . Overseeing the company's employees, and hiring, firing, and recommending personnel action.

Based on a work week of 40 hours or more, [The beneficiary] spends approximately 75% of his time in the U.S. coordinating and negotiating with U.S. cruise companies to plan the cruises and organize all details of upcoming cruising schedules; and 25% of his time overseeing the company's U.S. operations, including its finances and administration; developing and planning for the company's long term strategic goals and method for their implementation.

In response to a Service request for additional evidence, the petitioner indicated that the beneficiary spent 65 percent of his time expanding the business, performing such duties as: putting together new cruise itineraries; creating marketing and sales information for cruise companies; establishing contracts with government authorities; applying for licenses and permits for ships; establishing contracts with port authorities; establishing customs and immigration contacts for ships; negotiating contracts for services from suppliers; negotiating contracts with various Russian, Japanese and U.S. tour operators, maritime agents, border guards, etc; scouting areas for cruise companies; obtaining photos, videos, publications, brochures for marketing purposes; arranging for land excursions and other tours; and, arranging charter flights for passenger and crew. The petitioner further indicated that the beneficiary spent 10 percent of his time negotiating cargo shipments, overseeing seaport logistics, and establishing customs and immigration contacts for ships; 10 percent of his time directing and supervising the vice president/secretary and, 15 percent of his time planning long term strategic development.

As further evidence of the beneficiary's duties, the petitioner submitted a letter dated January 30, 2002, in which a tour promoter requested that the beneficiary provide the following services:

1. Confirm all port costs, tariffs, and fees in advance (Pro Forma invoice).
2. Secure all permits and permissions on behalf of [named company] required for all landings and port calls in Russia.
3. Schedule and secure officials required onboard to transit Russian waters.
4. Provide an experienced [REDACTED] agent to remain on board the vessel while in transit.
5. Secure and schedule all land based programs; village visits, local presentations including dances, demonstrations and musical performances, in addition to motor coach tours where available.
6. Secure provisions, spare parts, and sundries at the best available price as requested by the master.
7. Provide charter vessel and crew for [named company] inward and outward-bound clearance procedures.
8. Advance scouting of new landing sites, in advance, as required.

9. Provide [named tour promoter] passengers with a Letter of Invitation as required.
10. Provide support and assistance to [named tour group] staff and crew as required.
11. Provide advice and information germane to efficient and successful operation in Russia.
12. Present all final invoices for services within thirty days of conclusion of services.

On appeal, counsel states, in pertinent part, that:

[REDACTED] is in the business of providing logistical support to cruise vessels operating in the Russian Far East. The number of cruise companies interested in operating in this remote part of the world is increasing and [REDACTED] U.S.A. has become the essential link for American-based cruise companies to facilitate the complicated planning and logistics of these visits to the Far east. In performing these services, [REDACTED] U.S.A. necessarily works closely with its Russian affiliate [REDACTED], a company that employs 50 individuals.

[The beneficiary] serves as President of [REDACTED] and as General Director of [REDACTED] Russia. His duties in the United States include overseeing all U.S. operations, establishing and implementing the company's goals and policies, negotiating and consulting with U.S. cruise companies, and directing and supervising the activities of the company's other U.S. employee, its Vice President and Secretary. As discussed in the documentation submitted in response to the INS's Request for Evidence in this case, the primary focus of the President's activities is on developing the company's services and marketing the company. In order to expand the company's business, the President must devote time to negotiating and establishing contracts with Federal, Regional, and local governments, port authorities, customs and immigration officials, and various nature-related organizations. The President also devotes substantial time to marketing the company's services to U.S. cruise companies and other potential clients.

These duties are all inherently managerial and executive duties, requiring strategic decision-making, the exercise of discretion, and a high level of control and authority over all aspects of the company's operations. Further, as

in Matter of X, SRC 99-041-54850 (Oct.30, 2000), discussed above, all these duties relate to the essential company function of the development of the company's international trade in highly specialized services. Also as in Matter of X, the President is an executive/manager and decision maker for the foreign entity, which employs 50 individuals and which provides essential services necessary to the business of Pacific Network U.S.A.

In addition, it is important to note that, unlike in many of the AAU cases discussed above, [the beneficiary] is not the only employee of [REDACTED]. Rather, the company employs [named individual] as its Secretary and Vice President. [Named individual] is the individual responsible for the day-to-day operations of [REDACTED] as is inevitable due to the fact that [the beneficiary's] duties require him to travel a great deal. As defined in the company's response to the INS' Request for Evidence in this case, [named individual] is responsible, under the supervision of [the beneficiary] for contract administration, coordinating schedules, itineraries, and other issues, handling day-to-day office operations, assisting the President with regard to marketing operations, preparing documentation, planning itineraries, dealing with clients, and organizing the minutes of the shareholders meetings. As in Matter of X SRC 90-156-00380 (April 13, 1992), also discussed above, it is clear that [the beneficiary] is responsible for developing plans which are carried out by his subordinate, [named individual], who performs the day-to-day ministerial functions of the company.

Further, it is worth noting that, in addition to [the beneficiary] and [named individual], [REDACTED] contracts with numerous U.S. businesses, such as maritime agencies, suppliers, refuelers, stevedoring services, and vessel and airplane chartering services, among others. (See original letter by [REDACTED] in support of instant petition). As in Matter of X, SRC 95-226-51864 (February 29, 1996), discussed above, [the beneficiary] is thus responsible for the supervision of numerous subcontractors who provide services, managed by [REDACTED] to the company's clients.

Given the above facts, it is clear that [the beneficiary] manages an essential company function of international trade in highly specialized services and operates at a senior level within the organization. He oversees company operations which generated \$1.28 million during 2001, exercises discretionary judgement over all aspects of company operations, and has full managerial control and

authority. Because he manages an essential company function he does not need to supervise managerial, professional or supervisory employees.

Further, although the rule that an L-1A beneficiary cannot primarily perform the tasks necessary to provide the services of the organization was deleted by the 1990 Act, in the instant case the day-to-day ministerial functions of [REDACTED] are performed by [named individual]. This allows [the beneficiary] to focus on the executive/managerial functions.

On appeal, counsel argues that the beneficiary manages a function of the U.S. company. Counsel notes that the beneficiary acts as the U.S. company's president and has a secretary/vice president, who is responsible for the day-to-day operations of [REDACTED]

Counsel cites several unpublished AAU decisions, which have no precedential effect in this proceeding. See 8 C.F.R. § 103.3(c). Counsel correctly argues that single-person enterprises may qualify for L-1 status. However, counsel cites an unpublished decision arguing that the size of the business cannot serve as the basis for denial of an L-1 visa petition. This particular case dealt with the use of sub-contractors. However, counsel's allusion to this beneficiary directing the services of sub-contractors is not supported by the record. In contrast to the cited decisions, the record contains no evidence of the use of independent contractors by the petitioner that would relieve the beneficiary from performing nonqualifying duties. Nor, as referenced in another unpublished decision cited by counsel, is the petitioner a "new office," which has not had the time to develop a subordinate staff. It has also not been shown that the level of the petitioner's business activities warrants comparison with the start-up businesses in one of the decisions cited by counsel.

Based on the information contained in this record, there are only two employees, both having managerial titles, to provide the goods and services of the United States operation to its customers/clients. There is no evidence of any attempt having been made to hire any sales personnel or future plans to recruit sales people. The record, further, does not reflect that the U.S. company employs any salespersons even though it has been doing business for over 9 years and it experienced "roughly \$1.28 million dollars in gross revenues in 2001. With approximately \$1.28 million in gross revenue, it is logical to conclude that the petitioner would have some sales and marketing staff devoted to that function. In the absence of a sales and marketing staff, it must be concluded that such non-qualifying duties fall to the beneficiary.

When seeking classification of an alien as a manager based on managing or directing a function, the petitioner is required to establish that the function is essential and the manager is in a high-level position within the organizational hierarchy, or with respect to the function. The record must demonstrate that the beneficiary will be primarily managing or directing, rather than performing, the function. The record must further demonstrate that there are qualified employees to perform the function so that the beneficiary is relieved from performing nonqualifying duties. Evidence contained in the record indicates that the beneficiary has been and will be primarily performing, rather than directing, the function.

The petitioner has not demonstrated that the beneficiary functions at a senior level within an organizational hierarchy other than in position title. The petitioner has not demonstrated that the beneficiary is primarily engaged in managing or directing the management of a function, department, subdivision or component of the company. Further, some of the beneficiary's duties such as identifying, negotiating, and contracting with other business concerns have not been sufficiently shown to be managerial or executive responsibilities. The duties of the secretary/vice president notwithstanding, there is no evidence to establish that the petitioner employs a subordinate staff of professional, managerial or supervisory personnel who relieve the beneficiary from performing nonqualifying duties. For this reason, the petition may not be approved.

In visa petition proceedings, the burden of proof remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.